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In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 76-1726

MOBIL OIL CORPORATION, ET AL.,
Petitioner

versus

MRS. FRANCES NELL HIGGINBOTHAM, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER

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IN THE
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On Writ of Certiorari to The United States Court of Appeals
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BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals below is reported *sub nom., Higginbotham v. Mobil Oil Corp.*, 545 F.2d 422 (5th Cir. 1977) and is dated January 13, 1977.* The district court's initial opinion (App. Cert. A-1) is reported under the same style at 357 F.Supp. 1164 (W.D. La. 1973) and is dated April 25, 1973; while the second opinion (App. Cert. A-32), which deals with the issue of damages, is reported at 360 F.Supp. 1140 (W.D. La. 1973) and is dated June 25, 1973.

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* The opinions below are printed in the Appendix to the Petition for a Writ of Certiorari in this case and have not been reprinted, Rule 36, as supplemented, Rules of the Supreme Court. The court of appeals' opinion below occurs as Appendix C of that Appendix, hereinafter referred to as App. Cert., p. A-54.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) (1970).

The judgment of the court of appeals (App. Cert. A-54) is dated January 13, 1977. An order of the court of appeals denying Petitioner's motion for rehearing and suggestion for rehearing en banc (App. Cert. A-94), is dated March 7, 1977. The Petition for writ of certiorari was filed on June 6, 1977 and was granted on October 3, 1977.

QUESTION PRESENTED

Whether in overruling *The Harrisburg* [1] and creating a maritime cause of action for death occurring within state territorial waters in *Moragne,* [2] this Court also completely replaced the statutory cause of action for death mandated by Congress as to deaths occurring within the geographical scope of the Death on the High Seas Act?

STATUTES INVOLVED

The relevant portions of The Death on the High Seas Act, hereinafter referred to as DOHSA, as amended are as follows, 46 U.S.C. § 761 (1970), 41 Stat. 537:

> *Whenever the death* of a person shall be caused by wrongful act, neglect, or default occurring on the high seas *beyond a marine league from the shore*

1. 119 U.S. 199 (1886).
2. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (hereinafter referred to as *Moragne*).

> of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, . . . against the vessel, person, or corporation which would have been liable if death had not ensued. (emphasis supplied).

46 U.S.C. § 762 (1970), 41 Stat. 537:

> The recovery in such suit shall be a fair and just compensation for *the pecuniary loss* sustained by the persons for whose benefit the suit is brought. (emphasis supplied).

STATEMENT OF THE CASE

Petitioner, Mobil Oil Corp. (hereinafter referred to as Mobil), owned a helicopter which was used in its oil and gas drilling operations offshore Louisiana. On August 15, 1967, the aircraft landed on a fixed platform approximately 100 miles off the Louisiana coast in the Gulf of Mexico for the purpose of deplaning several workers and picking up others.[3] The helicopter disappeared within the geographic area covered by the Death on the High Seas Act[4] shortly after take-off with only a few parts of the aircraft being found. [5] Three passengers and the pilot of the aircraft died in the casualty. One of the passengers (Marshall Higginbotham) was an employee of Baxter Drilling Company, while the other two passengers (James Shinn and James Nation) were in the employ of Mobil and were judicially determined to

3. A. 4,5.
4. 46 U.S.C. § 761 *et seq.* (1970) (hereinafter referred to as "DOHSA."
5. A. 3.

be seamen.[6]

Litigation was commenced in a non-jury action in the district court against Mobil and Bell Helicopter Co., the manufacturer of the helicopter (hereinafter referred to as Bell Helicopter), seeking damages for the deaths based on the general maritime law as enunciated by this Court in *Moragne* and *Gaudet*,[7] as well as two federal statutes, the Jones Act[8] and DOHSA. The district court dismissed Bell Helicopter but found Mobil negligent.

The court of appeals below has held that the beneficiaries of these three men are entitled to recover death damages from Mobil as follows:

1. Higginbotham, not an employee of Mobil:

   (a) As provided by Congress under DOHSA for their pecuniary losses.

   (b) Under the general maritime law of *Moragne* and *Gaudet*, for their non-pecuniary damages.

2. Shinn and Nation, seaman employees of Mobil:[9]

   (a) As provided by Congress under the Jones Act for their pecuniary losses.

   (b) Under the general maritime law of *Moragne* and *Gaudet* for their non-pecuniary damages.

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6. App. Cert. 80
7. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) (hereinafter referred to as *Gaudet*.)
8. 46 U.S.C. §688 (1970).
9. While Mobil does not agree with the conclusion of the court below that Nation was a seaman for the reasons set out in its Petition for Writ of Certiorari, pages 13-19, since the Writ was not granted on this issue, Mobil must accept it for the purposes of this case.

This was the result in the court of appeals below as to the non-pecuniary damages only because an earlier panel of that court had so held in *Law v. Sea Drilling Co.*, 510 F 2d 242, *reh. denied, modified in part*, 523 F.2d 793 (5th Cir. 1975) (hereinafter referred to as *Law*). The members of the panel indicated that they agreed with the decision of the First Circuit in *Barbe*[10] in reading *Moragne* to state that DOHSA is the exclusive wrongful death remedy outside of state territorial waters, yet the panel concluded that this issue was foreclosed by the decision of the *Law* panel.[11]

In *Moragne*, this Court overruled *The Harrisburg*[12] and created a cause of action for wrongful death damages caused by the breach by a shipowner of its duty to provide a seaworthy vessel under the general maritime law. It did so because within the territorial waters of the several states, death remedies for unseaworthiness were available only if the wrongful death statutes of the state had been interpreted to permit it.[13] In so doing this Court provided for the first time a uniform remedy for deaths occurring within the territorial waters of the several states.

It was not until *Gaudet*, however, that this Court determined the items of damages which would be recoverable under the new cause of action for wrongful death under the

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10. Barbe v. Drummond, 507 F.2d 794 (1st Cir. 1974).
11. The court below stated:
    "The members of the panel would read *Moragne* to say that DOHSA is the exclusive *wrongful death* remedy outside of state territorial waters. The decision in *Law*, however, forecloses this issue for the panel." (App. Cert. A-86, n. 19) Since *Law* foreclosed the issue for the panel below, it did not discuss it. Therefore it is the *Law* opinions with which we must deal in this Court.
12. 119 U.S. 199 (1886).
13. For example, in Texas such actions were permitted, but as *Moragne* demonstrates, they were not permitted in Florida.

general maritime law within the territorial waters of the several states. The items of damages held recoverable were:

1. Pecuniary items:

   (a) Loss of support.[14]
   (b) Loss of services.[15]

2. Non-pecuniary items:

   (a) Loss of society.[16]
   (b) Funeral expenses.[17]

Outside the territorial waters of the several states, a cause of action for wrongful death damages caused by the breach of a shipowner's maritime duty to provide a seaworthy vessel already existed at the time of the *Moragne-Gaudet* decisions, having been created by Congress when it passed DOHSA in 1920. The issue presented here arises because the court of appeals below in *Law* recognized it could award damages for the non-pecuniary damage item of loss of society only if it replaced the Congressional DOHSA remedy with this Court's *Moragne-Gaudet* remedy.[18] In the picturesque style which characterizes his opinions, Chief Judge Brown as the organ of the Court below in *Law* openly acknowledged that the court intended to do just that:

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14. These items are set out in Footnote 19, original opinion of the court below in *Law*, 510 F.2d at 249 as Items (1) through (4) and are repeated in Footnote 3 of the court's opinion on rehearing, 523 F. 2d at 794.
15. *Id.* Item (8).
16. *Id.* Item (6).
17. *Id.* Item (5).
18. It is undisputed that the non-pecuniary wrongful death damage item for loss of society is not recoverable under DOHSA or the Jones Act because of the limitation of the damages under those two statutes to pecuniary losses only.

> It is time that the dead hand of *The Harrisburg*--whether in the courts or on the elbow of the congressional draftsmen of DOHSA--follow the rest of the hulk to an honorable rest in the briney (sic) deep.
>
> No longer does one need a state remedy. No longer does one need . . . DOHSA as a remedy. 523 F.2d at 798.[19]

Perhaps the question presented could be more picturesquely stated:

> Does this Court have the power to consign DOHSA completely to the briny deep or to the scrap heap in order to award non-pecuniary death damages not authorized by Congress in the statute?

Petitioner respectfully submits the Court has no such power.[20]

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19. Earlier in its opinion, the court below quoted with approval the text writers' similar views:
> Thus *Gaudet* . . .amply confirms our comment (written before *Gaudet* had been decided) that the *Moragne* case had "reduced both DOHSA and the FELA death provisions incorporated in the Jones Act to the level of nonstatutory Restatements." *Under Gaudet, indeed, all the state statutes seem to have joined the federal statutes on the scrap heap.* The maritime law death remedy, as explicated in *Gaudet*, is now more comprehensive and provides for a greater recovery than had previously been available under the federal death statutes or under most state death statutes. (Emphasis supplied). 523 F.2d at 796 [Quoting Gilmore & Black, The Law of Admiralty 369-70 (2d Ed. 1975)].

20. That this Court has such power as to state statutes insofar as the admiralty and maritime law is concerned is equally clear.

ARGUMENT

I. *Background*

The Court in *The Harrisburg*, 119 U.S. 199 (1886) held that the general maritime law did not afford a cause of action for wrongful death. The Congress thereafter in 1920 enacted two maritime remedial statutes:

1. The Death on the High Seas Act--to provide a remedy for wrongful deaths on the high seas (outside the three mile territorial waters of the states) based on the general maritime law of negligence or unseaworthiness.[21]

2. Jones Act--by incorporating the terms of the Federal Employers' Liability Act, granted seamen and their survivors a right of action against the employer for injury or death based solely upon negligence.[22]

DOHSA specifically provided that "the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought,"[23] and the Jones Act along with DOHSA, has been uniformly interpreted to permit recoveries of the same pe-

21. This statute permits not only recoveries based upon "neglect", but also on the unseaworthiness of the vessel under the maritime law. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n.12; (1970) In Re Dearborn Marine Service, Inc., 499 F.2d 263, 270, n. 10 (5th Cir. 1974); Doyle v. Albatross Tanker Corp., 367 F.2d 465, 468 (2nd Cir. 1966).
22. 46 U.S.C. §688 (1970) (Jones Act) incorporated by reference the FELA, 45 U.S.C. §51, *et seq.* (1970).
23. 46 U.S.C. § 762 (1970).

cuniary losses only.[24] More specifically, since loss of society is a non-pecuniary item of damages, it is not a recoverable item under either statute.[25]

The legislative history of DOHSA consists principally of the debate upon the floor of the House of Representatives. A review of the debate is instructive since it demonstrates that the Congressional intent was (1) to utilize the statute for the purpose of establishing a uniformity of remedies involving maritime deaths occurring one marine league (three nautical miles) from the shore of the United States,[26] (2) to

24. The following decisions support the proposition that the actual pecuniary loss to the survivors is the correct measure of damages. Decisions under the Jones Act: Michigan C.R. Co. v. Vreeland, 227 U.S. 59, 68 (1913) (FELA); Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 494 (5th Cir. 1962); Mpliris v. Hellenic Lines,Ltd., 323 F. Supp. 865, 895 (S.D. Tex. 1970), *aff'd mem.*, 440 F.2d 1163 (5th Cir. 1971); Petition of Risdal & Anderson, Inc., 291 F.Supp. 353, 357 (D. Mass. 1968). Decisions under the Death on the High Seas Act: Petition of United States, 418 F.2d 264, 272 (1st Cir. 1969); First Nat'l Bank in Greenwich v. National Airlines, Inc., 288 F.2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961). In Re Farrell Lines, Inc., 339 F. Supp. 91, 95 (E.D. La. 1971). Decisions under post-*Gaudet* general maritime law: Complaint ofCambria S.S. Co., 505 F.2d 517, 522 (6th Cir. 1974), *cert. denied*, 420 U.S. 975 (1975). This point becomes significant due to the *Gaudet* decision permitting dependent survivors to recover for the non-pecuniary item denominated as loss of society.
25. Loss of society is not permitted as a monetary loss under either the Jones Act or the Death on the High Seas Act. Jones Act: Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963), *cert cenied*, 376 U.S. 949 (1964); Savard v. Marine Contracting, Inc., 296 F.Supp. 1171, 1176 (D. Conn. 1969), *aff'd*, 471 F.2d 536 (2d Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). Death on the High Seas Act :First Nat'l Bank in Greenwich v. National Airlines,Inc., 288 F. 2d 621, 624 (2d Cir.), *cert. denied*, 368 U.S. 859 (1961); Green v. Ross, 338 F.Supp. 365, 367 (S.D. Fla. 1972), *aff'd*, 481 F.2d 102 (5th Cir.), *cert. denied*, 414 U.S. 1068 (1973); Valitutto v. D/S I/D Garonne, 295 F.Supp. 764, 765-6 (S.D. N.Y. 1969).
26. "MR. MOORE of Virginia. Is not the justification for section 7 found in the fact that some of the States under the State statutes take jurisdiction of causes of this character where even death may have occurred on the high seas, and that, therefore, you want to preserve that status and not interfere with it?

permit the particular law of the adjoining state to be applied within its three mile territorial waters due to congressional abstention, [27] and (3) to provide through statutory means an exclusive remedy for those deaths occurring within its

(Footnote 26 continued)

"MR. VOLSTEAD. No. If the gentleman will excuse me, my understanding is that the object of the act is to make a uniform rule for everything outside of the 3-mile limit." 59 Cong. Record 4482.

"MR. CULLEN. Then the purpose of that is to make the law uniform? Is that the object of it?

"MR. IGOE. The law is to remain as it is now, where there is a cause of action given by any State law or the decisions of the courts of those States for accidents in waters that are subject to the jurisdiction of those States. And then beyond that the State law does not apply, but this cause of actioin does apply." 59 Cong. Record 4483.

27. "MR. CONNALLY. Under the terms of section 7 what would be the effect of the bill as to a vessel, say, in the Mississippi River?

"MR. VOLSTEAD. It would be excluded from the operation of this law and be subject to the State laws as they are now." 59 Cong. Record 4483.

"MR. VOLSTEAD. Section 1 expressly provides that it shall apply to the high seas outside the 3-mile limit. Section 7 seeks to make certain that any action that originates inside of the 3-mile limit, the Great Lakes, or in the Canal Zone is not to be covered by this act." 59 Cong. Record 4482. *Note also* Greene v. Vantage S.S.Corp., 466 F. 2d 159, 167-8 (4th Cir. 1972) which commented upon the legislative history of DOHSA in the following manner:

> In enacting DOHSA, Congress specifically declined to extend its coverage to territorial waters. More significantly, however, Congress permitted the states to provide remedies for wrongful death on territorial waters which were not only diverse, but which in many instances permitted more liberal recovery than the recovery provided under DOHSA. This seems to negate any suggestion that Congress intended to have a uniform remedy or that it opposed the existence of remedies on territorial waters which differed from those provided for death on the high seas.

geographical area.[28]

During the years following 1920, there were judicial accommodations reached between the two statutes, as well as with the laws of the adjoining states. As this Court recognized in *Moragne*,[29] this Court first held in 1930 that the Jones Act was a seaman's exclusive remedy for wrongful death based on negligence and even precluded resort to state wrongful death acts for deaths within a state's territorial waters which afforded a remedy based on unseaworthiness under the general maritime law to non-seamen.[30] As recently as 1964, the Court reaffirmed this holding in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and affirmatively stated:

28. "MR. MONTAGUE. May I suggest–"

"MR. MONTAGUE. In reply to the statement of my colleague [Mr. Moore] I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that *when the Congress legislates in pursuance of constitutional authority such a law is exclusive.* It requires no asservation (sic) in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive. (emphasis supplied)

"MR. VOLSTEAD. My impression is it would be exclusive upon the theory the gentleman [Mr. Montague] suggests." 59 Cong. Record 4483. The Court of Appeals below in Dore v. Link Belt Co., 391 F. 2d 671, 675 (5th Cir. 1968) stated "[t]he legislative history indicates that when Congress passed the Death on the High Seas Act it intended the remedy it provided to be the exclusive one." This Court reversed the holding not upon the exclusive remedy provision of the statute, but on the basis that as between another competing federal statute, the Lands Act, DOHSA did not apply to a stationary platform. Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1969).

29. 398 U.S. at 396 n. 12.

30. Lindgren v. United States, 281 U.S. 38 (1930).

> Whatever may be this Court's special responsibility for fashioning rules in maritime affairs, we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act. [31]

At the same time *Moragne* recognized that *Gillespie* and the Jones Act did not disturb the rights of a seaman's beneficiaries to recover for death on the high seas caused by unseaworthiness under DOHSA. [32] Thus, at the time *Moragne* was before the Court, a remedy for wrongful death based on the general maritime law's unseaworthiness doctrine existed everywhere except within the territorial waters of the states within one marine league from shore as follows:

1. As to non-seamen (such as Higginbotham), in those states whose wrongful death statutes had not been interpreted as granting a remedy based on unseaworthiness.

2. As to seamen (such as Shinn and Nation) in any state.

II. *Moragne*

Longshoreman Moragne's death pointedly posed the problem confronting the beneficiaries of non-seamen because his death occurred aboard a vessel within the territorial waters of the State of Florida. The death occurred outside DOHSA's jurisdiction and the Supreme Court of

31. 379 U.S. at 155.

32. 398 U.S. at 396 n. 12. The reason for this holding is obvious because the Federal Employers' Liability Act, which the Jones Act made applicable to seamen, expressly provides that "[n]othing in this chapter shall be held . . . to impair the rights of . . . employees under any other Act or Acts of Congress." 45 U.S.C. §58 (1970).

Florida had held that Florida's wrongful death act did not permit a recovery based on the general maritime law's unseaworthiness doctrine. While the Jones Act was not available because Moragne was not a seaman, this Court recognized that if *The Harrisburg* was to be overruled and a maritime death remedy based on unseaworthiness created, it would be necessary to determine whether it would apply to seamen as well as non-seamen.[33]

The vessel owner in *Moragne* contended that in passing DOHSA, Congress had ceded exclusively to the States this Court's traditional responsibility for the maritime law, 398 U.S. at 396-7, and therefore this Court could not create a wrongful death remedy under the maritime law to be applicable within the territorial waters of the States. After discussing the legislative history of DOHSA, this Court held:

> Read in the light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for death in territorial waters . . . .The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to

33. The Court recognized that it had to do so to avoid perpetuating the anomaly that existed in those states whose death acts permitted actions based on unseaworthiness:

> [T]he "strangest" anomaly is that a true seaman--that is, a member of a ship's company, covered by the Jones Act – is provided no remedy for death caused by unseaworthiness within territorial waters, while a longshoreman, to whom the duty of seaworthiness was extended only because he performs work traditionally done by seamen, does have such a remedy when allowed by a state statute. 398 U.S. at 395-6.

> fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed. 398 U.S. at 397-8.

Having thus recognized that DOHSA pre-empted the field only within its geographical sphere, this Court succinctly held:

> We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law *in situations not covered by the Act.* (Emphasis supplied). [34]

In overruling *The Harrisburg*, this Court created a cause of action under the general maritime law for death caused by the unseaworthiness of a vessel in the only geographical area where no such maritime cause of action then existed–within the three mile limit. It left, however, for "further sifting through the lower courts in future litigation" the issues relating to which beneficiaries of a decedent were entitled to recover and what damages were to be recoverable. 398 U.S. at 408.

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34. 398 U.S. at 402. It should also be recalled that the Court stated: "We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation (death within state territorial waters) of this petitioner." (Parenthetical expression supplied.) 398 U.S. at 393.

III. *Gaudet*

The sifting of the damage issue in the lower courts did not take long, for only 3-1/2 years after *Moragne*, this Court was called upon to decide it in *Gaudet*.[35] Longshoreman Gaudet died as a result of injuries sustained aboard a vessel within the territorial waters of a state. Thus, like longshoreman Moragne, neither DOHSA nor the Jones Act was available to him and his only wrongful death remedy was the one created under the general maritime law by *Moragne*.

In *Gaudet* this Court held that under the judicially created wrongful death remedy within state territorial waters the following items of damages were recoverable:

1. Pecuniary items:

   (a) Loss of support.
   (b) Loss of services.

2. Non-pecuniary items:

   (a) Loss of society.
   (b) Funeral expenses.

Gaudet also recognized the distinction between wrongful death damages and "survival damages," that is, damages to compensate the decedent's estate for damages incurred by him personally, such as conscious pain and suffering, and it recognized that DOHSA has no survival provisions.[36] As

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35. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974).

36. 414 U.S. at 575 n. 2.

Gaudet had previously recovered a judgment for all of the damages sustained by him personally, survival damages were not an issue in *Gaudet*. Survival damages are not at issue here either. Both the court below and the First Circuit in *Barbe* concluded that *Moragne-Gaudet* created a cause of action for "survival damages" as well as for wrongful death damages. [37]

This distinction is crucial for both the *Barbe* court and the court below recognize loss of society as both a wrongful death damage item and non-pecuniary and therefore not recoverable under DOHSA. *Gaudet* permits a recovery of this non-pecuniary death damage item under the *Moragne* wrongful death action. This Court recognized in *Gaudet* that it was thus permitting a recovery of an item of damage under the maritime law which was not available under DOHSA. 414 U.S. at 588 n. 22. We do not here question the Court's power to do so in those areas where Congress has not expressly provided a maritime remedy, such as within the territorial waters of the States involved in both *Moragne* and *Gaudet*. But where Congress has already provided a maritime remedy, neither this Court nor the court below is free to either replace or change the remedy. The broad discretion vested in Congress by the Constitution with respect to the maritime law was affirmatively stated by this Court in declining to declare the Jones Act unconstitutional thusly:

> After the Constitution went into effect, the substantive (maritime) law theretofore in force was not regarded as superseded, or as being only the law of the several states, but as having become the law of the United States,- subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require.

37. *Barbe*, 507 F.2d at 799; *Law*, 523 F.2d at 795.

> When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject, and permits of the exercise of a wide discretion. (Parenthetical expression supplied). *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Even the case of *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), quoted and relied on in *Gaudet*[38] for the proposition that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law", makes it clear that this responsibility extends only to those areas in which Congress has not legislated. In addition to the foregoing statement in *Fitzgerald* about its responsibility, this Court affirmatively recognized the limitation on its responsibility when it held:

> [S]ince Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, *we would not be free*, even if we wished, to require submission of all the claims to the judge alone.(Emphasis supplied) 374 U.S. at 21.

As applied to the present case this statement can be paraphrased thusly:

> Since Congress in DOHSA has declared only pecuniary damages are recoverable for death, we are not free, even if we wished, to require the payment of non-pecuniary damages for loss of society.

Additionally, the Court's quotation from *Moragne* in footnote 22 of *Gaudet* with respect to the legislative history of DOHSA is incomplete and only part of a sentence. The

38. 414 U.S. at 588 n. 22.

complete sentence in *Moragne* reflects that it relates to those areas covered by state remedies and not to those covered by DOHSA:

> To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law. 398 U.S. at 400.

Both the First Circuit in *Barbe* and the panel of the court below in this case recognized this limitation on the responsibility of the federal courts for fashioning the maritime law of the United States and concluded that DOHSA was the exclusive remedy for wrongful death within its geographical limits, and therefore the damages recoverable should be limited to the pecuniary losses provided by Congress. However, the panel of the court below was foreclosed from reaching this result because another panel of the Fifth Circuit had earlier held in *Law* that the maritime cause of action for wrongful death created in *Moragne* completely replaced DOHSA and that the non-pecuniary loss of society item of death damages was recoverable within, as well as without, DOHSA's geographical limits.

IV. The Divergent Conclusions of *Barbe* and *Law*

The First Circuit's decision in *Barbe* preceded the Fifth Circuit's decision in *Law*. After recognizing that "survival and wrongful death actions have long been recognized as distinct causes of action," and that Congress had not provided a survival action but only a cause of action for death in DOHSA, *Barbe* held that *Moragne* provided ample support for its holding "that there is a federal maritime survival

action, created by decisional law . . . ." 507 F. 2d at 799. But the *Barbe* court flatly rejected the contention that *Moragne* had replaced DOHSA as the remedy for wrongful deaths more than one marine league from shore:

> Since DOHSA clearly provides a cause of action for wrongful death in this case, we fail to see how *Moragne* applies. We hold that the measure of damages for wrongful death provided by DOHSA, namely, "pecuniary loss," controls in the instant case. The Supreme Court in *Moragne* stated that the recognition of a maritime wrongful death action would not "require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing maritime law." 398 U.S. at 405-406, 90 S.Ct. at 1790. Yet there is a substantial difference between removing a decisional bar like The Harrisburg and circumventing a statutory mandate like DOHSA. We believe that to cast aside DOHSA in favor of the *Moragne* cause of action would be to engage in a "*tabula rasa* restructuring of the law of admiralty," Sea-Land Services, Inc., *supra*, 414 U.S. at 596, 94 S. Ct. at 806, 820 (dissenting opinion), of the sort *Moragne* counseled against. 507 F.2d at 801.

The original opinion in *Law* by the Fifth Circuit was based on that court's erroneous conclusion that both *Barbe* and an earlier decision of the Fifth Circuit in *Dennis*[39] had concluded that *Moragne* applied on the high seas including the geographical area embraced in DOHSA.[40]

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39. Dennis v. Central Gulf S.S. Corp., 453 F.2d 137 (5th Cir.), *cert. denied*, 409 U.S. 948 (1972).

40. The Fifth Circuit said in its original opinion:
> We join the First Circuit in its recent *Barbe* decision to now hold what we said in *Dennis* that *Moragne* applies not only to navigable waters of the States, but to the High Seas as well, including the area defined in DOHSA. 510 F.2d at 250.

On rehearing the Fifth Circuit recognized that *Barbe* had reached exactly the opposite result from that of the Fifth Circuit. It also recognized that its decision in *Dennis* did not support its decision, for it neither cited nor referred to *Dennis* in its opinion on rehearing. It could not cite or refer to *Dennis* on rehearing because one of its assigned reasons for refusing to follow *Barbe* was that the *Barbe* result would produce a lack of uniformity which the admiralty law abhors. The only lack of uniformity, however, is in the items of death damages recoverable under DOHSA (pecuniary only) and *Moragne* (both pecuniary and non-pecuniary). In summary, the uniformity the *Law* court sought on rehearing was in the elements of damages and it could not rely on *Dennis* which had already expressly held this was not the "uniformity" which the admiralty sought:

> The "uniformity" that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in differing circumstances with differing classes of beneficiaries. 453 F.2d at 140.[41]

This Court also recognized uniformity in the elements of damages is not required for wrongful deaths occurring within admiralty's jurisdiction in *Gaudet*.[42]

The other reasons asserted in *Law* on rehearing in support of its holding contrary to *Barbe* are equally unmeritorious:

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41. It is unfortunate that the panel in *Law* did not show the same deference to *Dennis* that the panel in this case showed to *Law*. Had it done so, it would have followed *Barbe* and this case would not be here. In accord with *Dennis* on this uniformity issue are two additional post-*Moragne* cases: Spiller v. Thomas M. Lowe, Jr. & Associates, Inc., 466 F.2d 903, 906-7 (8th Cir. 1972); Greene v. Vantage S.S. Corp., 466 F.2d 159, 165 (4th Cir. 1972).

42. 414 U.S. at 588 n. 22.

Reasons asserted for the conclusion in *Law*	Invalidity of the reason:
1. Nowhere does the Supreme Court indicate that the fact that Gaudet's injury occurred in territorial waters rather than on the High Seas is critical. 523 F. 2d at 796.	The opposite is equally true: there is no indication that it is not critical or that *Moragne-Gaudet* are to replace the Congressional mandate of DOHSA.
2. *Moragne* recognized that "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." 523 F.2d at 797.	This quotation comes completely out of context as the first part of the sentence from which the quotation is taken reflects this Court is referring to the state remedies and not to DOHSA. The first part of this sentence says: "To put it another way, the message of the Act (DOHSA) is that it does not by its own force abrogate available state remedies;".[43] Furthermore, in *Moragne* this Court expressly limited its ultimate holding to those areas not covered by DOHSA: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations *not covered by the Act*." (Emphasis supplied). 398 U.S. at 402.

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43. 398 U.S. at 400 (Parenthetical expression supplied).

3. The pecuniary loss test is inconsistent with the humanitarian principles of the maritime law. 523 F. 2d at 794-5.	The fact that an act of Congress may be considered by the courts to be inconsistent with humanitarian principles as to the damages to be paid under that act, does not give the courts the power to replace the act completely or to change the damages recoverable under it.
4. The *Barbe* decision "adds another anomaly to the three that Mr. Justice Harlan hoped to lay to rest in Moragne." The anomaly is that a complaint having a Rule 9(h) admiralty designation could have only the Death on the High Seas Act as a subject while those filed in a state court or the "law side" of the federal court could claim "the full panoply of recovery under *Moragne*." 523 F.2d at 796-7.	First, under *Barbe*, the *Moragne-Gaudet* theories could not be applied on any docket if the casualty occurred on the "high seas"--only DOHSA is applicable. Second, there is nothing in *Barbe* which produces any anomaly, since the decision prohibits the application of *Moragne-Gaudet* beyond the three mile limit. Third, an action pursuant to the Jones Act or any other maritime theory, including *Moragne-Gaudet*, may at the plaintiff's election be filed pursuant to Rule 9(h) in admiralty.
5. The *Barbe* decision leads to a trifid system predicated upon the docket selected by the litigant. 523 F.2d at 797-8.	The trifid system already exists having been put in operation by the Congress in 1920 when its Jones Act gave a seaman killed on the high seas the right to trial by jury in state or federal court on

his negligence claim but required him to assert his unseaworthiness claim under DOHSA in admiralty. In fact, the *Barbe* decision eliminates this trifid system for all deaths except those involving seamen as it recognizes a geographical line of demarcation established by an act of Congress upon which the docket selected by the litigant has no bearing. On the DOHSA side of the line, only one docket is available--admiralty. On the other side of the line within state territorial waters where *Moragne-Gaudet* are applicable, the plaintiff has the option to select a jury trial on the civil docket or a non-jury trial by designating the case as subject to Rule 9(h) in admiralty.

6. There is no expression of policy to be derived from the legislative history of the Death on the High Seas Act regarding the application of the *Moragne-Gaudet* remedies. 523 F.2d at 797 n. 11.	The *Moragne* opinion was concerned with whether the statute's legislative history demonstrated that state statutes were to be exclusive within the one marine league area. The legislative history of DOHSA shows that during the course of debate on the floor of the House of Representatives, the House considered that ". . . when the Congress legislates in

pursuance of constitutional authority such a law is exclusive."[44]

Despite the *Law* court's attempt to make it appear that the *Barbe* court was creating many problems that would not otherwise exist, as the foregoing demonstrates, this is not the result. Indeed, *Barbe* (1) simply leaves the Congressional wrongful death remedies intact within their designated geographical area where they can continue to be applied uniformly as the admiralty requires while (2) the new *Moragne-Gaudet* wrongful death remedy is also applied uniformly within the territorial waters of the several States--the geographical area which Congress deliberately excluded from DOHSA.

CONCLUSION

Petitioners respectfully submit that this Court should hold that DOHSA and/or the Jones Act constitute the exclusive remedies for wrongful death on the high seas beyond a marine league from shore and reverse the holding of the Court below to the contrary.

Respectfully Submitted,

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44. 59 Cong. Record 4483. See discussion of DOHSA legislative history, *supra*, pp. 9 to 11.

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CERTIFICATE OF SERVICE

The undersigned counsel for petitioner has caused three copies of the foregoing Brief for Petitioner to be served on Jack Benjamin, 1718 NBC Building, New Orleans, La., 70112; Jack Caldwell, 519 Main Street, P.O. Box 592, Franklin, La., 70538; Messrs. Thompson & Sellers, P.O. Box 308, 112 South Louisiana Ave., Abbeville, La. 70510 and I. P. Saal, Jr., P.O. Box 176, Gueydan, Louisiana, by placing in the U.S. Mails, first class postage prepaid, this the 16th day of November, 1977.

CARL J. SCHUMACHER, JR.

Corrected copies mailed and
served this 2nd day of December, 1977.